BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA

Appeal of Georgetown Homeowners Alliance BZA Appeal No.

STATEMENT OF THE APPELLANT

This is an appeal pursuant to 11 D.C.M.R. §§ 3105.1 and 3200.2. The Appellant is the Georgetown Homeowners Alliance, a District of Columbia Non-Profit Corporation, whose principal address is 1642 35th Street, N.W., Washington, D.C. 20007, seeks review of the March 18, 1999 decision of the Zoning Administrator to approve an application for a building permit for 1659 - 61 35th Street, NW, Lot 217, Square 1291, and a decision made on or about April 16 to lift a stop work order previously issued and to deny a request for a permanent revocation of the building permit. As discussed more fully herein, the construction authorized is in violation of the zoning regulations regarding the establishment of a commercial use, in this case, a restaurant and carryout in an R-3 zone. Specifically, since the previous use was operated illegally, the owner's right to operate as a non-conforming restaurant use has been vitiated. See 11 D.C.M.R. § 2003.5. Therefore, the permit has been issued incorrectly, and the owner must obtain a use variance before proceeding with a commercial use on the site.

Section 3380.4 (c) of the Zoning Regulations exempts from payment of the filing fee a citizens association or association created for civic purposes and not for profit. Georgetown Homeowners Alliance is such an entity and its members own property either adjacent to or in the neighborhood of the subject site. The Alliance's interest in preserving the zone plan, the values of neighborhood real estate property and the residential character of the subject area will be adversely affected if the

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proposed use is permitted to be located at the subject site. The Board has previously permitted the appellant to proceed in accordance with §3380.4(1).

I.

On February 27, 1999, representatives from the appellant met with Armando Lourenço, Administrator of the Building and Land Regulation Administration and Acting Zoning Administrator, and learned in casual conversation that the applicant, Mr. Basil Gogos, intended to open a new restaurant and carryout on the premises. The appellant reminded Mr. Lourenço of the history of the case, and advised him that such a use would be illegal. Agreeing that such a use would require Board of Zoning Adjustment approval, the Zoning Administrator agreed to"flag" the building permit application because of the potentially illegal use. In fact, subsequently the Zoning Administrator informed appellant that a building permit was being sought and that the applicant had been informed that relief was necessary from the Board of Zoning Adjustment to use the premises as proposed.

In March, 1999, workers were seen at the site renovating the existing building for use as a restaurant. Representatives from the community met with the Zoning Administrator on March 19, 1999 and indicated that the use of the premises was either that of a restaurant or a carry out, and, as such, was illegal because such a grandfathered non-conforming use had been vitiated. Appellant also argued that the prior restaurant use had been abandoned. While, the Zoning Administrator agreed to investigate the matter further, on March 18, 1999, DCRA issued a building permit since the Zoning Administrator had purportedly determined to his satisfaction that the facility was a restaurant, and that the previous restaurant use had not been abandoned, since the building permit had been applied for within the 3 year period specified in the zoning regulations, after which a non-conforming use is considered abandoned, if the use has not been operating for that period.

Subsequently, the appellant met with office of the Deputy Mayor of Economic Development and DCRA. A stop work order was issued. However, the applicant successfully argued to the Department of Consumer and Regulatory Affairs and the Corporation Counsel's office that the stop work should be lifted, which it was, on or about April 16, 1999.

Accordingly, the appellant filed the instant appeal.

In a statement before the Board of Zoning Adjustment dated August 12, 1970, in BZA Appeal No. 10485, the Citizens' Association of Georgetown's Chairman of Zoning, Planning, and Building Regulations, Mrs. Harold B. Hinton, listed chronologically the certificates of occupancy that had been issued for the premises at 1661 35th Street, NW from 1951 through 1969. The listing shows that the 1951 certificate was the last certificate that permitted a use as "Delicatessen-Luncheonette." Every subsequent certificate through 1969 was issued for a use as a "Restaurant." And, every attempt to enlarge the use to include a carry-out has been denied.

Mrs. Hinton contended that the old delicatessen use was given up voluntarily in 1956, leaving only the more restrictive nonconforming restaurant use. She further argued that the matter had not gone to the Board because it was not a change of use but merely a dropping of one of two commercial uses ("the worse of the two.") She noted that during the subsequent 14 years seven certificates had been issued to six different operators including the then-current one, all for the identical use, "restaurant seating less than 50 persons." She urged the Board to uphold the Zoning Administrator in denying any use other than "restaurant seating less than 50 persons" at 1661 35th Street, NW, citing the rules to the effect that "when an existing nonconforming use has been changed to a conforming or more restrictive use, it shall not be changed back to a nonconforming or less restrictive use." The Board ultimately did exactly as Mrs. Hinton had urged: it found that

the prior certificate of occupancy for this site was for a "restaurant seating less than 50 persons," and affirmed the Zoning Administrator's refusal to expand that use beyond the last permitted use of record. Thus, Mr. Gogos was estopped from arguing that it had established any grandfathered carry-out use or food delivery use before.

Sometime after those appeals were decided, Whayne S. Quin, of the law firm of Wilkes & Artis, who represented Mr. Gogos in the recent appeal by him regarding Papa Johns on this site, wrote the Corporation Counsel, C. Francis Murphy, in regard to the use of the premises. Mr. Quin argued that "a limited carry-out use (as opposed to a delicatessen) [was] permitted as a matter of right" at the premises. He further asserted that the restaurant operation of his client was "substantially different and more limited in use than the previous owner's use which was the subject of the prior Board cases. Absolutely no prepared or 'ready-to-eat food products' are available such as would be available at a 'delicatessen." Moreover, in no sense of analysis, is Mr. [Gogos]' business '90% . . . carry out.' His business is a 'restaurant' with the necessary indicia to make it a restaurant." In this last statement he apparently responded to a finding by the Board as to the prior owner that "Appellant alleges that approximately 90% of his business is carry-out and has been since prior to 1957." Thus, whereas the prior owner had sought to expand his use from restaurant to restaurant-delicatessen by arguing that the business had in fact been mostly carry-out for 13 years, the new owner, represented by new counsel, argued that in no way was the business mostly carry-out. Instead, he sought to continue carry-out operations under the guise of an accessory use incidental to a principal use as a restaurant.

In the 1970 BZA proceedings, the property owner sought a variance to change the use of his property from a restaurant to a restaurant with delicatessen and carry-out. The Board of

Zoning Adjustment denied the appeal (Appeal No. 10291) -- i.e., it denied a variance for the proposed expansion of the use of the premises beyond the existing restaurant use. Reconsideration of the decision was requested, asserting that the owner was entitled to continue nonconforming uses that predated the adoption of the 1985 amendments to the rules. The Board suggested that the owner apply for a certificate of occupancy with the Zoning Administrator. The owner did so, but the Zoning Administrator denied the application. The Board then declined to consider the outstanding petition for reconsideration, but did consider a new appeal (Appeal No. 10485), this time of the Zoning Administrator's denial of the application for a certificate of occupancy.

The Board, in the end, ruled that the evidence was in conflict concerning whether the asserted use of the premises as a restaurant and delicatessen had been a legally existing nonconforming use. It found that the prior certificate of occupancy was for a "restaurant seating less than 50 persons," and affirmed the Zoning Administrator's refusal to expand that use beyond the last permitted use of record. The final determination, after protracted proceedings before the Zoning Administrator and the Board, was that the permissible use of the premises was as a restaurant, and only a restaurant, not a carry out or food delivery use.

A year after the Board proceedings the government warned the then-new owner of the business that the premises were being used "as a restaurant and delicatessen without a proper Certificate of Occupancy," and directed him to apply before the Board. Two years later, the owner having declined to pursue this course, the government filed suit against him on the grounds that he was using the premises primarily as a carry-out business and that he was using contiguous open space as outdoors restaurant space, in violation of the certificate.

The parties stipulated to a dismissal that provided, inter alia, that (a) there would be no restaurant use of the adjoining space; (b) the owner would not enlarge the dining area beyond 50 seats; and (c) Gionis would not sell prepackaged food or drinks as is normally contemplated in a delicatessen. The clear intent of the government's suit, and the result of the stipulation, was to limit the use of the premises -- in terms of the nature of that use, the space dedicated to that use, and the number of patrons allowed -- to the terms of the certificate of occupancy, i.e., restaurant seating fewer than 50 persons.

Twenty years later, the last operator of the business at the premises, the Orient Express, was charged with operating a fast-food restaurant in violation of its certificate of occupancy; in the words of the hearing examiner who heard the case, "virtually abandoning the concept of an eat in/sit down establishment." However, the investigator who had visited the premises testified," inter alia, that:

a. While there, he observed approximately six diners seated, with only one carry-out customer;

b. A sign which read "Fast, free delivery" had been there since before the respondent assumed ownership; and

c. He concluded that there was insufficient evidence to determine that the business was in violation of the zoning regulations (i.e., operating as anything other than a restaurant).

The charge was dismissed at the unopposed motion of the respondent. The hearing examiner, in granting the motion, admonished the respondent to operate the business "within the confines of his C of O, and if he [was] not doing so, [to] modify his operations." The business, in other words, was found to be operating as a restaurant only, and its owner was told to keep it that way. However, in support of his appeal of the denial of a certificate of occupancy for Papa John's, Mr. Gogos testified before the Board of Zoning Adjustment, under oath, that the Orient Express was using the premises in exactly the same fashion as that proposed by Papa Johns.[1] In essence, Mr. Gogos admitted that the immediate past use of the premises was, as found by the Board of Zoning Adjustment, in essence an illegal use.

**Discussion**

The illegal use of the premises by the Orient Express invalidated any grandfathered use of the subject site as a restaurant. This conclusion is supported by a number of cases involving the use of property at 304-306 Independence Avenue, S.E. (Applications of Michael Lange).

In 1978, Lange sought a special exception to extend a non-conforming office use to additional floors of the building and the change a non-conforming beauty salon use to a real estate office use and law firm use. With regard to the expansion to the second floor, the Board held that the previous occupancy of that floor as a residence had terminated the right to use it for non-conforming uses. The Board did permit the change from beauty parlor to real estate use. Mr. Lange appealed. In its decision, the Court noted that the real estate office and law office were

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[1] Mr. Gogos argued that, since the property had been used as a carry out before the fast food regulations were adopted by the Zoning Commission in 1985, and as a food delivery business before the food delivery regulations were adopted by the Zoning Commission in 1993, therefore those uses were grandfathered.

using the second floor of the building without valid certificates of occupancy. *Lange v. Board of Zoning Adjustment*, 407 A.2d 1058, 1059 (D.C. 1979). The Court also noted that Lange's parents used the second floor as an antique shop and for the sale of oriental rugs, without valid certificates of occupance. *Id.* Accordingly, the Court held that such uses, although approved as extensions of non-conforming uses, became illegal uses. *Id.* at 1060. As the Court further recognized, the property owner may not be permitted to benefit from the illegal use of the premises to establish a basis for a valid non-conforming use. *Id.* at 1061.

Thereafter, Lange sought a special exception so that he could change a non-conforming beauty salon use to a travel agency use. The Board denied the application. According to the Board, since the nonconforming beauty salon use had been replaced by an illegal use, this constituted a change in use which vitiated any right to continue using the premises for any grandfathered nonconforming use. Lange appealed this decision but by the time the matter came before the Court the travel agency had vacated the premises.

In light of the foregoing, the law in the District is that if you have a nonconforming use and thereafter use the premises for an illegal use, you lose the right to re-establish the prior non-conforming use or take advantage of any of the non-conforming use provisions of the Zoning Regulations. That rule of law should apply here to void the building permit issued to the owner of the subject premises.

Respectfully submitted,

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